STATE OF MICHIGAN

COURT OF APPEALS

PHILIP ALLOR, Plaintiff-Appellant/Cross-Appellee, v DECLARK, INC., BRUCE W. DECLARK, and SUPERIOR MACHINE COMPANY, INC., Defendants, and SUPERIOR PRESS & AUTOMATION, INC., Defendant-Appellee/Cross-Appellant.	UNPUBLISHED February 21, 2012 No. 300953 Ottawa Circuit Court LC No. 01-041341-CK

Before: SAWYER, P.J., and O'CONNELL and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals by right a bench trial judgment in his favor on his claim of unjust enrichment, and defendant Superior Press & Automation, Inc. (Superior Press) cross-appeals by right the same judgment as well as an order denying defendant's motion for case evaluation sanctions. We affirm in part, reverse in part, and remand.

This case involves, in relevant part, a software licensing dispute. Plaintiff (through a company he owned) licensed software he had developed, a multifunction program called FOPS, to DeClark, Inc. DeClark, Inc. was to pay a monthly license fee of $985 beginning January 1, 1997, though May 1, 2003, and a final balloon payment of $80,521 on June 1, 2003. The license was not assignable. Darin DeClark, the son of Bruce DeClark, who owned DeClark, Inc., used FOPS while at DeClark, Inc.[1] In September 1999, Darin incorporated Superior Press, at which

[1] DeClark, Inc. had at the time assumed the name of Midwest Fabricating pursuant to another agreement with plaintiff that is not at issue in this appeal, but for clarity we continue to refer to the business entity as DeClark, Inc.

he used FOPS during 2000.[2] Around mid-March 2000, Darin contacted plaintiff for assistance with the software. According to Darin, he was unaware of the licensing agreement until the instant lawsuit; according to plaintiff, he helped Darin after being told that Superior Press and DeClark, Inc. were the same company. In fact, Superior Press was an independent corporate entity.

This lawsuit was commenced by plaintiff to, in relevant part, recover the FOPS license fee from Superior Press.[3] The trial court found that Darin used FOPS in Superior Press's operation for approximately 15 months, in 2000 and until April 1, 2001, when he switched to a different software package. The trial court found that Superior Press had been unjustly enriched by this unlicensed usage, and it found that the only evidence of the value of that benefit was the monthly charge of $985. Therefore, the trial court ordered a judgment in plaintiff's favor in the amount of $14,775. Following trial, defendant moved for case evaluation sanctions pursuant to MCR 2.403, because plaintiff had rejected a case evaluation award of $130,000 and did not do substantially better at trial. The trial court denied that motion because certain evidence—a check register tending to disprove one of plaintiff's other claims—had not been provided to the case evaluators, nor to plaintiff, before case evaluation was rejected by plaintiff. It was, however, found in time for, and admitted at, trial. This appeal followed.

We review a trial court's findings of fact and determination of damages in a bench trial for clear error, and review de novo its conclusions of law. *Chelsea Investment Group, LLC v City of Chelsea*, 288 Mich App 239, 250; 792 NW2d 781 (2010); *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002). A finding is clearly erroneous if there is no evidentiary support for it or if we are left with a definite and firm conviction that a mistake has been made. *Chelsea Investment Group*, 288 Mich App at 251.

Unjust enrichment is defined as the unjust retention of "money or benefits which in justice and equity belong to another." *McCreary v Shields*, 333 Mich 290, 294; 52 NW2d 853 (1952) (internal quotation and citation omitted). "'A person who has been unjustly enriched at the expense of another is required to make restitution to the other.'" *Kammer Asphalt Paving Co, Inc v East China Twp Sch*, 443 Mich 176, 185; 504 NW2d 635 (1993), quoting Restatement Restitution, § 1, p 12. If a plaintiff can establish that the defendant received a benefit from the plaintiff and that the plaintiff suffered an inequity as a result, "the law will imply a contract in order to prevent unjust enrichment." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003).

Plaintiff presented evidence that defendant received the benefit of using FOPS for 15 months and that plaintiff suffered an inequity because defendant did not pay for that usage. We agree with plaintiff that the trial court's findings of fact that defendant was unjustly enriched

---

[2] Although not directly relevant to this appeal, DeClark, Inc. was forced into involuntary bankruptcy by its creditors in 2001, whereupon the FOPS software license terminated. DeClark, Inc. did not make any payments to plaintiff on the license after 2000.

[3] Plaintiff brought a number of other claims, the particulars of which are not relevant.

were fully supported by the evidence. We also agree with plaintiff that the trial court correctly concluded as a matter of law that plaintiff had established a claim of unjust enrichment. However, we conclude that the trial court's calculation of damages was erroneous, and we agree with neither party as to the proper amount.

The correct measure of damages in an unjust enrichment claim is the value of the benefit received by the defendant, not the actual damage which has been suffered by the plaintiff. *McIntosh v Fixel*, 297 Mich 331, 342-343; 297 NW 512 (1941); *B & M Die Co v Ford Motor Co*, 167 Mich App 176, 182-183; 421 NW2d 620 (1988). Defendant argues that the appropriate amount of damages is $249, the cost of the software package with which FOPS was replaced. Plaintiff argues that the appropriate amount of damages is $156,366, the total cost of the software license to DeClark, Inc. We disagree with both assessments.

First, the replacement software package performed different functions from FOPS. It may well be that defendant did not need all of the functionality FOPS provided. However, by using FOPS, defendant had all of FOPS's functionality available to it. Additionally, defendant was familiar with FOPS when it commenced operations, and it goes without saying that that familiarity would have had some value itself. More importantly, defendant cites no authority for the proposition that damages for unjust enrichment purposes should be calculated on the basis of replacement value. The benefit that defendant received was the usage—to whatever degree it chose to exercise—of FOPS for 15 months. Likewise, however, plaintiff's argument is equally unavailing, because the entire license cost to DeClark, Inc., would have given DeClark, Inc., the use of FOPS for 77 months. By the same logic, defendant received nowhere near the same benefit.

We believe that the trial court generally took the correct approach in multiplying the number of months defendant used FOPS by the monthly fee for its use. However, we conclude that the trial court erred in excluding the final "balloon payment" from its calculation. The final payment was part of the total license fee, it was simply particular manner of scheduling payment. The proper amount of damages is the *total* license fee of $156,366, divided by the 77 months covered by the license, multiplied by the 15 months during which defendant actually used FOPS. The true monthly cost was $2,030.73, and so the true amount by which defendant was unjustly enriched was $30,460.95. Accordingly, we reverse the trial court's damages award and remand for modification of the judgment consistent with this opinion.[4]

On cross appeal, defendant argues that the trial court erred in refusing to award case evaluation sanctions in its favor where plaintiff rejected the case evaluation award of $130,000, and did not do substantially better at trial. We review de novo a trial court's decision regarding a

[4] Defendant argues for the first time on appeal that plaintiff is entitled to no award of damages because he was negligent for not seeking a license from defendant. Defendant waived this defense by failing to plead it below in accordance with MCR 2.119(F). Because failure to raise an issue in the trial court generally waives review of that issue on appeal, we decline to consider it. *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008).

motion for case evaluation sanctions under MCR 2.403(O). *Ivezaj v Auto Club Ins Ass'n*, 275 Mich App 349, 356; 737 NW2d 807 (2007).

MCR 2.403(O)(1) is a mandatory rule requiring a party who rejects a case evaluation to "'pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation.'" *Haliw v Sterling Hts (On Remand)*, 266 Mich App 444, 447; 702 NW2d 637 (2005). "The purpose of case evaluation sanctions is to shift the financial burden of trial onto 'the party who demands a trial by rejecting a proposed [case evaluation] reward.'" *Allard v State Farm Ins Co*, 271 Mich App 394, 398; 722 NW2d 268 (2006), quoting *Bennett v Weitz*, 220 Mich App 295, 301; 559 NW2d 354 (1996) (alteration added in *Allard*). "The decision to award case evaluation sanctions is determined as a matter of law; it is not a discretionary matter." *Id*. The verdict was more favorable to defendant, so the trial court lacked the legal discretion to refuse to award sanctions. *Allard*, 271 Mich App at 398-399. [5]

However, there are circumstances under which the imposition of case evaluation sanctions would fundamentally undermine the purpose of MCR 2.403 altogether and therefore be so unfair that the trial court might properly refuse to award them despite the absence of a formal exception to the operation of the Court Rule. In *Warren v Pickering*, 192 Mich App 153; 480 NW2d 306 (1991), the trial court ordered the plaintiffs and an intervening plaintiff to pay case evaluation sanctions to the defendants after a judgment of no cause of action; the defendants had accepted an evaluation favorable to the plaintiffs, but the plaintiffs had refused it. Notably, the intervening plaintiff, although listed as a party, did not have any claim evaluated, did not participate in the evaluation, and did not itself reject anything or play any role in plaintiffs' rejections. This Court concluded that, because the intervening plaintiff did not in any way participate in the rejection, imposing sanctions on the intervening plaintiff did not further the purposes of MCR 2.403 of encouraging settlement by imposing the burden of litigation on a party who insists on going to trial.

The situation at bar is not identical to the situation in *Warren*, insofar as plaintiff did technically reject the case evaluation award. However, plaintiff did so on the basis of incomplete information that—through no fault of anyone—would reasonably have made plaintiff's position appear significantly different than it turned out to be. We do not believe that every discrepancy in evidence presented to case evaluators as opposed to at trial should negate the validity of a case evaluation award.

[5] We note that there are three enumerated circumstances identified by MCR 2.403 under which case evaluation sanctions need not be granted, but none of them apply here.

But whether or not the omission was intentional, we conclude that under these facts, the evidence was of such significance that the case evaluation award could not be considered valid, and so any acceptance or rejection thereof was a nullity. The trial court, with its vastly superior familiarity with the case and perceptions of the parties before it, so found. We decline to interfere with that decision. Under the circumstances, the imposition of sanctions would not have furthered the purposes of MCR 2.403.

The trial court's award of damages in favor of defendant is reversed and remanded for modification of the judgment consistent with this opinion. The trial court's refusal to award case evaluation sanctions is affirmed. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Peter D. O'Connell
/s/ Amy Ronayne Krause